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IN THE
Supreme Court of the United States

CATHOLIC CHARITIES OF THE DIOCESE OF ALBANY, *et al.*,

Petitioners,

v.

ERIC R. DINALLO, SUPERINTENDENT, NEW YORK STATE INSURANCE DEPARTMENT,

Respondent.

On Petition for a Writ of Certiorari to the New York Court of Appeals

BRIEF FOR ADVENTIST HEALTH, THE ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, THE BECKET FUND FOR RELIGIOUS LIBERTY, THE CHRISTIAN LEGAL SOCIETY, THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, LOMA LINDA UNIVERSITY, LOMA LINDA UNIVERSITY MEDICAL CENTER, THE NATIONAL ASSOCIATION OF EVANGELICALS AND THE UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the State may compel a church or church entity, contrary to its religious teachings, to include contraceptives in the prescription drug program that it provides to its employees, and thereby finance conduct that the church teaches is sinful.

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On Petition for a Writ of Certiorari to the New York Court of Appeals

This brief of *amici curiae*[1] is submitted in support of petitioners Catholic Charities of the Diocese of Albany, *et al.* By letters filed with the Clerk of the Court, petitioners and respondent have consented to the filing of this brief.

INTERESTS OF *AMICI CURIAE*

Adventist Health is a California non-profit corporation organized exclusively for religious purposes. It owns and operates 18 hospitals and medical centers, all of which are operated in a manner that is consistent with the philosophy, teachings, and practices of the Seventh-day Adventist Church. Adventist Health employs approximately 19,000 employees.

[1] Pursuant to Rule 37.6, *amici curiae* state that no party authored this brief in whole or in part, and no person or entity, other than *amici curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

The Association of Christian Schools International ("ASCI") is a nonprofit, non-denominational, religious association providing support services to more than 3,950 Christian preschools, elementary, and secondary schools in the United States. One hundred forty-five post-secondary institutions are also members of ACSI, and ACSI serves more than 1,400 schools outside the United States.

The Becket Fund for Religious Liberty ("Becket Fund") is a non-partisan, interfaith, public interest law firm dedicated to protecting the free expression of all religious traditions, and the equal participation of religious people and groups in public life and benefits. The Becket Fund litigates in support of these principles in state and federal courts throughout the United States, both as primary counsel and as *amicus curiae*. Virtually all of those cases involve claims against the government under the federal Free Exercise Clause, and in those cases the Becket Fund argues in favor of vigorous interpretation of the Free Exercise Clause to safeguard and maximize the free expression of all religious traditions.

The Christian Legal Society, founded in 1961, is a nonprofit interdenominational association of over three thousand Christian lawyers, law students, judges, and law professors. CLS's members hail from almost every state and participate in the broad and rich variety of Christian congregational life, including the Roman Catholic, Orthodox, Lutheran, Anglican, Episcopalian, Baptist, Presbyterian, Methodist, Reformed, Evangelical, Pentecostal and Charismatic traditions. Since 1975, CLS's legal advocacy division, the Center for Law and Religious Freedom ("CLRF"), has worked for the protection of religious belief and practice, including the autonomy of religion and religious organizations from the government, in the United States Supreme Court and in state and federal courts throughout the nation. CLS has filed briefs of *amicus curiae* in virtually every case in the United States Supreme Court affecting religious freedom since 1980 and, through CLRF, has

represented numerous religious organizations and individuals whose religious liberty is threatened. Believing that our universal and fundamental right to religious freedom is the inalienable gift of God, not man, CLS strives to defend religious freedom in order that men and women might remain free to do God's will.

The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist church and represents nearly 54,000 congregations with more than 15 million members worldwide. In the United States, the North American Division of the General Conference overseas the work of more than 4,600 congregations with more than 918,000 members. In addition to churches and related administrative offices, the denomination runs approximately 850 elementary schools, 114 secondary schools, 14 institutions of higher learning and 35 hospitals in the United States. The church employs over 78,000 individuals in the United States. The Seventh-day Adventist church has a strong interest in insuring that religious institutions are not compelled to extend benefits that violate the tenets that define the very basis for their existence.

Loma Linda University is a California non-profit religious corporation and is part of the Seventh-day Adventist Church. The University, which is located in Loma Linda, California, is an institution of higher education that offers both undergraduate and post-graduate degrees.

Loma Linda University Medical Center ("LLUMC") is part of the Seventh-day Adventist Church and a California non-profit religious corporation. LLUMC is a teaching hospital and tertiary care center located in Loma Linda, California. It employs approximately 5,200 employees.

The National Association of Evangelicals ("NAE") is the largest network of evangelical churches, denominations, colleges, and ministries in the United States. It serves 60 member denominations and associations, representing 45,000

local churches and over 30 million Christians. NAE serves as the collective voice of evangelical churches and ministries. NAE believes that religious freedom is a gift of God and vital to the limited government which is our American constitutional republic.

The Union of Orthodox Jewish Congregations of America ("UOJCA") is the largest Orthodox Jewish umbrella organization in the United States. The UOJCA represents nearly 1,000 synagogues throughout the United States, which collectively represent hundreds of thousands of individual Jews. The UOJCA, its affiliated congregations and their members also support many social service organizations, small and large, dedicated to addressing and relieving people in need of aid and assistance. Additionally, the UOJCA participates in various federal and state litigations, largely through the submission of *amicus* briefs, that relate to matters of concern to the Orthodox Jewish community.

Amici are a broad-based coalition of religious institutions that believe this case raises important questions about the religious liberty of all religious entities under First Amendment. *Amici* submit that this case is of particular significance because it illustrates one of the principal dangers inherent in legislative line-drawing based on expressly religious terms and the need for that line-drawing to be justified under the most rigorous strict scrutiny under the First Amendment.

Although *Amici* do not all subscribe to petitioners' religious tenets relating to prescription contraception, they are united in their concern over the legal principles set forth in the ruling below. The New York Court of Appeals concluded that the First Amendment, as interpreted by this Court in *Employment Division* v. *Smith*, 494 U.S. 872 (1990), provides no protection to disfavored religious groups from legislation that requires them, but not other religious groups, to violate their sincerely held religious beliefs. Such a law is neither

"neutral" nor "generally applicable" within the meaning of this Court's decision in *Smith*.

As set forth below, review should be granted for two reasons. First, the decision below conflicts directly with decisions of the Third Circuit holding that a State law that adopts individualized or categorical exemptions from a statute that burdens religious exercise is not "neutral" or "generally applicable," and therefore must be assessed under strict scrutiny. *Fraternal Order of Police* v. *City of Newark*, 170 F.3d 359, 364 (3d Cir. 1999) (Alito, J.); *Blackhawk* v. *Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) (Alito, J.).[2]

Second, the decision below conflicts directly with this Court's decisions holding that laws that discriminate *among* religious groups – thereby allowing the State to pick and choose which claims of religious conscience are worthy of favored treatment – must satisfy strict scrutiny. *E.g.*, *Corporation of the Presiding Bishop* v. *Amos*, 483 U.S. 327, 339 (1987); *Larson* v. *Valente*, 456 U.S. 228, 246 (1982); *see also Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 533 (1993). In rejecting the settled standards set forth in these cases, the Court of Appeals adopted a dangerous precedent that approves religious gerrymanders and, if left uncorrected, threatens the First Amendment rights of all religious groups.

STATEMENT OF CASE

Amici adopt the Statement of the Case set forth in the Petition for Certiorari. *Amici*, however, briefly highlight a number of aspects of the record relevant to their submission.

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[2] In all events, the State may not trample on the free exercise rights of *all* religious groups when (i) it fails to apply a law to *all* secular groups (including, for example, the governmental entity enacting the law or subordinate governmental entities), or (ii) as here, the legislation implicates hybrid-rights within the meaning of this Court's decision in *Smith*. *See* Pet. at 13-20.

New York's Women's Health and Wellness Act ("WHWA") requires that all group insurance policies that include coverage for prescription drugs also provide coverage for prescribed contraceptive drugs or devices. Pet. App. 97a, 99a. The New York Legislature included an exemption from this requirement for "religious employers" for whom compliance would require them to violate their religious tenets. The term "religious employer" is defined as those entities that can satisfy all of the following criteria:

> (a) The inculcation of religious values is the purpose of the entity.
>
> (b) The entity primarily employs persons who share the religious tenets of the entity.
>
> (c) The entity serves primarily persons who share the religious tenets of the entity.
>
> (d) The entity is a nonprofit organization as described in Section 6033(a)(2)(A)i or iii, of the Internal Revenue Code of 1986, as amended.

Under the WHWA, when a religious employer qualifies for this exemption, its employees remain eligible for such coverage through a state-mandated rider that they can purchase from their employer's insurance carrier at a cost estimated to be "on the order of $1.00 or $2.00 per month." Pet. App. 52a n.16, 71a.[3]

Petitioners are all nonprofit religious organizations, churches and religious orders that qualify as "religious employers" in other statutory contexts including employment

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[3] The New York Legislature initially proposed a broader religious exemption that would have been available to "any 'group or entity . . . supervised or controlled by or in connection with a religious organization or denominational group or entity.'" Pet. App. 3a (omission in original). The Legislature, however, ultimately adopted a more narrow exemption through which the WHWA's prescription contraception mandate would have a wider reach. *Id.*

and housing discrimination. Pet. App. 53a; see N.Y. Exec. Law § 296.11. All qualify as charitable organizations exempt from federal taxation. They do not qualify as "religious employers" within the meaning of WHWA, however, because their activities are not limited to "ministering to the faithful" and because they employ and "serve people not of their faiths." Pet. App. 4a. As part of their religious mission, they operate, for example, "a K-12 school" that provides "youth services," as well as a "prison ministry," "homeless services," "immigrant resettlement programs, affordable housing programs, job development services, and domestic violence shelters." *Id.*[4]

As the Court of Appeals acknowledged, petitioners "believe contraception to be sinful, and assert that the challenged provisions of the WHWA compel them to violate their religious tenets." Pet. App. 4a. Further, there is no debate that petitioners are religious groups as neither the "sincerity of their beliefs" nor the "centrality of those beliefs to their faiths" is in dispute. *Id.* Nor did the Court of Appeals dispute that the WHWA imposes a burden on petitioners' sincerely held religious beliefs. *Id.*

The Court of Appeals acknowledged that the WHWA, by its terms, provides a system of exemption based upon the characteristics of the religious employers. Thus, a religious entity is excluded from the WHWA's definition of "religious employer" if, for example, it does not "serv[e] primarily persons who share the religious tenets of the entity," or does not "primarily employ[] persons who share the religious tenets of the entity." Pet. App. 97a. As a result, under the WHWA, an otherwise exempt religious group that provides

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[4] For example, as part of its mission of evangelization, petitioner St. John the Baptist Church operates St. John the Baptist School, which serves not only children of the parish, but also non-Catholic children from its community. *See* St. John the Baptist School, *at* http://www.stjohnthebaptistrcc.org/Ministries%20-%20English.htm# School.

prescription drug benefits to its employees is required to violate its sincere religious beliefs if it ministers to members outside its faith, but not if it provides service only to individuals within its faith.

In the decision below, the New York Court of Appeals ruled that the WHWA was a "neutral" law of "general applicability" even though the WHWA "exempt[s] some religious institutions and not others" from its mandates. Pet. App. 6a. The Court of Appeals defended its conclusion by asserting that application of heightened scrutiny would "discourage the enactment of any such exemptions – and thus [would] restrict, rather than promote, freedom of religion." *Id.* at 6a-7a. Finally, even though the WHWA expressly discriminates among religious groups on facially religious grounds, the Court of Appeals held that the WHWA is "generally applicable and neutral *between* religions." *Id.* at 14a (emphasis added).

REASONS FOR GRANTING THE PETITION

Amici fully agree that review should be granted for the reasons set forth in the Petition. Consistent with the Question Presented in the Petition, *Amici* submit that review also should be granted because the New York Court of Appeals erroneously held that a State can, without meaningful First Amendment constraint, adopt laws that require some religious groups, but not others, to "violate their religious tenets by financing conduct that they condemn." Pet. App. 4a.

As shown in Part I, the decision below conflicts with decisions of the Third Circuit, which hold that where a "'State has in place a system for individual exemptions,'" it "'may not refuse to extend that system to cases of religious hardship without compelling reason.'" *Fraternal Order of Police* v. *City of Newark*, 170 F.3d 359, 364 (3d Cir. 1999) ("*FOP*") (quoting *Employment Div.* v. *Smith*, 494 U.S. 872, 884 (1990)); see *Blackhawk* v. *Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004).

As shown in Part II, review also is warranted because the decision below conflicts with this Court's decisions ruling that when a State draws distinctions *among* religious groups, it must satisfy strict scrutiny. See *Corporation of the Presiding Bishop* v. *Amos*, 483 U.S. 327, 339 (1983); *Larson* v. *Valente*, 456 U.S. 228, 246 (1982).

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE THIRD CIRCUIT.

1. In its decision, the Court of Appeals acknowledged that the WHWA did not apply across the board to all employers. Rather, the WHWA created a system for exemptions for a limited number of religious employers. Under that system, "some religious organizations – in general, churches and religious orders that limit their activities to inculcating religious values in people of their own faith – are exempt from the WHWA's provisions on contraception," but other religious organizations are not. Pet. App. 6a. More specifically, under the WHWA, eligibility for the "religious employer" exemption is determined based upon a series of religion-specific factors including (i) the "purpose" of the religious entity, (ii) whether the employees of the religious entity share its "religious tenets," and (iii) whether the religious entity "serves primarily persons who share the religious tenets of the entity." *Id.* at 97a. The intended effect of these religion-specific criteria was to "exempt some religious institutions and not others." *Id.* at 6a.

Despite the fact that the WHWA treats religious employers differently based upon the "purpose" or mission of the religious employer and the "religious tenets" of its employees and those it serves, the Court of Appeals concluded that the WHWA is "neutral" and "generally applicable" for purposes of the First Amendment. Pet. App. 6a. In doing so, the New York Court of Appeals expressly adopted the analysis of the Supreme Court of California, which upheld a California statute "nearly identical to the WHWA." *Id.* at 7a; *see also*

Catholic Charities of Sacramento, Inc. v. *Superior Court*, 85 P.3d 67 (Cal.), *cert. denied*, 543 U.S. 816 (2004); Pet. 11 & n.6 (citing similar statutes passed in other states).

2. In contrast, the Third Circuit has adopted a fundamentally different approach to determining whether a law is "neutral" and "generally applicable." As then-Judge Alito explained, "in circumstances in which individualized exemptions from a general requirement are available, the government may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *FOP*, 170 F.3d at 364 (quoting *Lukumi*, 508 U.S. at 537-38).

In *FOP*, the court of appeals considered a challenge by Sunni Muslim police officers to a department policy that prohibited them from wearing beards, but permitted exemptions from the no-beard policy for "medical reasons." *Id.* at 360. The *FOP* court concluded that the police officers' challenge to the no-beard policy was subject to heightened scrutiny under pre-*Smith* cases because the department created a system of exemptions for "individuals with a secular objection but not for individuals with a religious objection." *Id.* at 365. Applying heightened scrutiny, the Third Circuit concluded that the no-beard policy violated the Free Exercise Clause. *Id.* at 366-67.

Subsequently, in *Blackhawk* v. *Pennsylvania*, 381 F.3d 202 (3d Cir. 2004), the Third Circuit considered the claims of Dennis Blackhawk, a Lakota Indian who sought an exemption from a permit fee so that he could possess bears on his property for religious purposes. *Id.* at 204-05. The court of appeals agreed that "a 'neutral' and 'generally applicable' law that burdens conduct regardless of whether it is motivated by religious or secular concerns is not subject to strict scrutiny." *Id.* at 209. The Third Circuit held, however, that the Pennsylvania law requiring Blackhawk to pay a fee to keep bears on his property was not a law of "general applicability" because the law (i) also created an "individualized" system of exemptions, and (ii) included categorical exemptions for

"zoos and 'nationally recognized circuses.'" *Id.* at 209-11.[5] Applying strict scrutiny, the Third Circuit held that the Pennsylvania law could not be applied to Blackhawk because it was "doubtful" that it furthered a compelling governmental interest, and, in all events, the law was not properly tailored to serve any such interest. *Id.* at 214.

3. The decisions of the New York Court of Appeals (and the California Supreme Court) are in direct conflict with the Third Circuit as to the test for determining whether a law is "neutral" and "generally applicable" for purposes of the Free Exercise Clause.

In this case, the WHWA contains a system of exemptions that includes "individualized" assessments that turn on such matters as whether the religious entity "serves primarily persons who share the religious tenets of the entity," as well as relatively more categorical exemptions for entities for whom the "inculcation of religious values is the purpose of the entity."[6] Under *FOP* and *Blackhawk*, that system of exemptions would trigger strict scrutiny because, under Third Circuit law, a state's adoption of individualized or categorical exemptions within a statutory scheme means that the statute is

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[5] The conflict among the federal courts of appeals is not confined to the Third Circuit. Indeed, the Third Circuit has acknowledged that its interpretation of Smith in FOP has generated a conflict with two other federal courts of appeals which have held that "the Free Exercise Clause offers no protection when a statute or policy contains broad, objectively defined exceptions not entailing subjective, individualized consideration." *Tenafly Eruv Ass'n* v. *The Borough of Tenafly*, 309 F.3d 144, 166 n.27 (3d Cir. 2002) (citing *Swanson* v. *Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 701 (10th Cir. 1998), *American Friends Serv. Comm.* v. *Thornburgh*, 951 F.2d 957, 961 (9th Cir. 1991)).

[6] There can be no doubt that the WHWA creates a system of individual exemptions. To qualify for the exemption, a religious institution must satisfy four statutory requirements, three of which plainly require an individualized assessment of the nature of the institution's religious mission. Pet. App. 97a, 99a.

not "generally applicable" within the meaning of *Smith*. As a result, if petitioners' challenge to the WHWA were assessed within the Third Circuit, strict scrutiny would apply to petitioners' First Amendment challenge to the WHWA's system of exemptions.

Conversely, if the standards set forth by the New York Court of Appeals in this case (or the California Supreme Court in the parallel *Catholic Charities* case) were applied in *FOP* and *Blackhawk*, then the laws and policies at issue in those cases would have been subject to rational-basis review or no review at all. Under the decision below, a statute is "neutral" and "generally applicable" within the meaning of *Smith* even if it includes individualized or categorical exemptions. Pet. App. 6a. Indeed, according to the New York Court of Appeals (and the California Supreme Court), a statute remains "neutral" and "generally applicable" under *Smith* even if the state legislature creates a system of exemptions designed to benefit "some religious institutions and not others." *Id.*

Review is warranted to resolve this conflict between the Third Circuit, on the one hand, and the New York Court of Appeals and California Supreme Court, on the other.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT HOLDING THAT LAWS THAT DISCRIMINATE AMONG RELIGIOUS GROUPS MUST SATISFY STRICT SCRUTINY.

Unlike the WHWA, the systems for categorical and individual exemptions at issue in *FOP* and *Blackhawk* did not purport to discriminate *among* religious groups based on religious grounds. That distinction, however, merely underscores the need for review because this Court's cases have made clear that the First Amendment mandates that "laws discriminating *among* religions are subject to strict scrutiny." *Amos*, 483 U.S. at 339.

1. In *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, this Court reiterated the long-standing principle that the "protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs." 508 U.S. 520, 532 (1993). The *Lukumi* Court explained that the Free Exercise Clause prohibits statutes that "impose special disabilities on the basis of religious status,'" *id.* at 533 (alteration and ellipsis omitted) (quoting *Employment Div.* v. *Smith*, 494 U.S. 872, 877 (1990)), and thus precludes a government from applying "a municipal ordinance . . . to prohibit preaching in a public park by a Jehovah's Witness but to permit preaching during the course of a Catholic mass or Protestant church service," *id.* (citing *Niemotko* v. *Maryland*, 340 U.S. 268, 272-73 (1951). Indeed, "the minimum requirement of neutrality is that a law not discriminate [against a religion] on its face." *Id.*

There can be no question that the WHWA discriminates *among* religious groups on religious grounds. This is not an instance where secular criteria are alleged to result in a disparate impact among religious groups. Cf. *Employment Div.* v. *Smith*, 494 U.S. 872 (1990). For example, the WHWA exempts religious entities that are "inward-looking" (their missions focus primarily on instructing, employing, and serving members of its own faith), but *excludes* "outward-looking" religious entities (whose religious mission encompasses hiring and serving people of other faiths). Pet. App. 97a. Under the authorities described above, such an exemption scheme is subject to strict scrutiny, and thus cannot survive a constitutional challenge absent a showing that it is narrowly tailored to further a compelling governmental interest.

2. The Court of Appeals' effort to reconcile its decision with these long-standing principles caused it to issue a ruling that flatly misconstrues this Court's decision in *Amos*.

In its decision, the Court of Appeals relied upon the analysis of the California Supreme Court addressing a

California statute nearly identical to the WHWA. Specifically, the court below quoted language from this Court's decision in *Amos* to argue that this Court "has never prohibited statutory references to religion for the purpose of accommodating religious practice" and has "repeatedly indicated that it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." Pet. App. 7a (quoting *Amos*, 483 U.S. at 335) (internal quotation marks omitted). That argument badly misreads this Court's decision in *Amos*.

In *Amos*, this Court explained that there is a critical distinction between "laws 'affording a uniform benefit to *all* religions'" and "laws discriminating *among* religions." 483 U.S. at 339. Where a law affords a uniform benefit to all religions, it is unquestionably "a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Id.* at 335. But, a law that discriminates "*among* religions" is "subject to strict scrutiny." *Id.* at 339 (citing *Larson*, 456 U.S. at 246).[7]

Based upon this misreading of *Amos*, the decision by the New York Court of Appeals to reject strict scrutiny creates a square conflict with this Court's decision in *Larson*. At issue in *Larson* was a Minnesota statute that required charitable organizations to abide by a series of income reporting requirements. 456 U.S. at 231-32. Although the statute initially exempted all religious organizations, the legislature subsequently narrowed the exemption so that it extended only

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[7] The D.C. Circuit also has explained that the decision in *Amos* was animated by the general "prohibition on . . . intrusive inquiries into religious belief" to determine "which activities of a religious organization were religious and which were secular." *University of Great Falls* v. *NLRB*, 278 F.3d 1335, 1341-42 (D.C. Cir. 2002); *id.* ("'[C]ourts should refrain from trolling through a person's or institution's religious beliefs'") (quoting *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality opinion)).

to religious organizations that obtained more than half of their contributions from their own members and affiliated organizations. *Id.* at 230-31. Under that narrowed definition, the Unification Church did not qualify as an exempt religious organization. *Id.* at 231-32.

The Supreme Court found that the statute "grant[ed] denominational preferences" which it defined as the granting of exemptions on the basis of "deliberate distinctions between different religious organizations." *Id.* at 246, 247 n.23. Although the Minnesota statute did not mention any organization or denomination by name, on its face, it did not "operate evenhandedly." *Id.* at 253. Accordingly, the Court explained that the statute would have to be "invalidated unless it [could be] justified by a compelling governmental interest, and unless it [was] closely fitted to further that interest." *Id.* at 246-47 (internal citation omitted).[8]

The WHWA is materially indistinguishable from the Minnesota statute invalidated in *Larson.* Like that statute, the WHWA includes an exemption available only to a subset of all religious organizations. *See id.* at 231. And, as in *Larson*, the New York legislature drafted the exemption with the express intention that it would provide relief only to some religious groups, and not others. Pet. App. 6a. Most significantly, the WHWA resembles the statute invalidated in *Larson* because they both create "denominational preferences." *Larson*, 456 U.S. at 246.

As noted, in *Larson*, this Court defined "denominational preferences" to mean a statute that "makes explicit and

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[8] *Larson* distinguished *Gillette* v. *United States*, 401 U.S. 437 (1971), because in that earlier case – which involved a challenge to the "conscientious objector" provision of the Military Selective Service Act – the governmental classification was based on "'individual conscientious belief'" and not upon distinctions between "religious organizations." 456 U.S. at 247 n.23. Here, as in *Larsen*, the WHWA makes "explicit and deliberate distinctions between different religious organizations." *Id.*

deliberate distinctions between different *religious organizations*." *Id.* at 246, 247 & n.23 (emphasis added). There can be no question that the WHWA likewise "makes explicit and deliberate distinctions between different religious organizations." *See id.* Indeed, in *Larson*, the "denominational preferences" took the form of an express distinction between religious groups whereby "only those religious organizations that received more than half of their total contributions from members or affiliated organizations would remain exempt from the registration and reporting requirements." *Id.* at 231-32. Here, the WHWA creates a preference for religious entities whose missions do not involve outreach to individuals outside their faiths, Pet. App. 97a, 99a, and disfavors religious entities that seek to serve individuals who do not share their "religious tenets." *Id.*

In the decision below, the Court of Appeals asserted that *Larson* is distinguishable because the WHWA distinguishes "between religious organizations based on the nature of their activities" and that is "not what *Larson* condemns." Pet. App. 14a-15a. But that is plainly wrong. *Larson* struck down a statute that distinguished between religious organizations on the basis of the manner in which they solicited contributions. 456 U.S. at 246, 247 n.23. The impermissible distinction among religious groups was based entirely on "the nature of their activities": religious groups that raised funds from their own members were not required to register, but religious groups which, by necessity, or "'as a matter of policy . . . favor public solicitation over general reliance on financial support from members'" were subject to reporting and registration requirements. *Id.* Review is warranted because the decision below is in direct conflict with *Larson*.

3. Lastly, the New York Court of Appeals sought to justify its ruling by asserting that religious liberty for *some* groups is preferable to religious liberty for *none*.

The Court of Appeals reasoned that imposition of a heightened standard of review for discriminatory exemptions

would "discourage the enactment of any such exemptions – and thus . . . restrict, rather than promote, the freedom of religion." Pet. App. 6a-7a. Put another way, the court below reasoned that if a State is denied free rein to discriminate in favor of some religious groups – and against others – then the legislature instead would choose to discriminate against *all* religious groups. That reasoning, however, runs contrary to this Court's jurisprudence reflecting that the First Amendment, at its core, mandates neutrality of treatment among religious groups.

It is a fundamental tenet of settled religious liberty jurisprudence that the State may not discriminate between religious institutions:

> Few concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least . . . benevolent neutrality towards churches and religious exercise generally *so long as none was favored over others and none suffered interference.*

Walz v. *Tax Comm'n*, 397 U.S. 664, 666-67 (1970) (emphasis added); see also *Board of Educ.* v. *Grumet*, 512 U.S. 687, 706-07 (1994) (holding that a religious accommodation that "singles out a particular religious sect for special treatment" violates the fundamental requirement of "neutrality as among religions"); *Fowler* v. *Rhode Island*, 345 U.S. 67 (1953) (concluding that the free exercise rights of Jehovah's Witnesses were violated when an ordinance prohibiting religious meetings in a public park was applied to them but not to other religious groups).

Justice Harlan likened this neutrality inquiry to an "equal protection mode of analysis." *Walz*, 397 U.S. at 696 (Harlan, J., concurring). He noted:

> In any particular case the critical question is whether the circumference of legislation encircles a class so broad that it can fairly be concluded that religious institutions

> could be thought to fall within the natural perimeter. . . . Obviously the more discriminating and complicated the basis of classification for an exemption – even a neutral one – the greater the potential for state involvement in evaluating the character of the organizations.

Id. at 696, 698-99. Accordingly, "[t]he Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymander[ing]." *Id.* at 696.

The reason that the Supreme Court has mandated "neutrality" of treatment among religious groups is that "[f]ree exercise . . . can be guaranteed only when legislators - and voters – are required to accord to their own religions the same treatment given to small, new, or unpopular denominations." *Larson*, 456 U.S. at 245. As Justice Jackson explained in a separate context, "there is no more effective practical guarantee against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

The First Amendment was designed to ensure that "every denomination would be equally at liberty to exercise and propagate its beliefs" and that "such equality would be impossible in an atmosphere of official denominational preference." *Larson*, 456 U.S. at 245. As such, the First Amendment unquestionably prohibits ""the state preferring some religious groups over [others]." *Fowler*, 345 U.S. at 69.

CONCLUSION

For these reasons, and those set forth in the Petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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